THE SUPREME COURT OF THE STATE OF ALASKA

MARJORIE LIVENGOOD, Appellant, v. CHRISTOPHER LIVENGOOD, Appellee.	)	Supreme Court No. S-14188 Superior Court No. 3PA-10-01552 CI MEMORANDUM OPINION AND JUDGMENT* No. 1413 – March 28, 2012

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Vanessa White, Judge.

Appearances: Marjorie J. Livengood, pro se, Wasilla, Appellant. Steven Pradell, Steven Pradell & Associates, Anchorage, for Appellee.

Before: Carpeneti, Chief Justice, Fabe, Winfree, and Stowers, Justices. [Christen, Justice, not participating.]

1. This appeal concerns the custody of Marjorie and Christopher Livengood's two minor children following the couple's divorce. Marjorie appeals the superior court's order awarding primary physical and sole legal custody to Christopher.

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* Entered pursuant to Appellate Rule 214.

2. When the couple separated in 2010, Marjorie initially agreed that Christopher would have custody of the children during the school year. After receiving a job offer in Oregon that he wished to accept, Christopher filed a motion for interim relief requesting permission to relocate to Oregon with the children. Marjorie opposed this motion. Following an interim hearing on June 17, 2010, the court allowed Christopher to move to Oregon with the children and enroll them in school there in the fall. Marjorie filed a motion for reconsideration, which the court denied.

3. Following the final divorce hearing on December 28, 2010, the superior court awarded Christopher primary physical and sole legal custody of the children. The court found this was in the best interests of the children because Christopher could provide a more stable environment in light of Marjorie's plan to leave her job of 10 years, move away from Alaska, and rely on her boyfriend to support her and her children even though he had no legal obligation to do so.

4. Marjorie appeals the final custody order, arguing the superior court erred in applying the best interest factors under AS 25.24.150(c)[1] and abused its discretion by considering impermissible criteria and improperly weighing certain factors.

5. Trial courts enjoy broad discretion in making child custody determinations.[2] "We will reverse a trial court's resolution of custody issues only if this court is convinced that the record shows an abuse of discretion or if controlling factual

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[1] AS 25.24.150(c) provides "[t]he court shall determine custody in accordance with the best interests of the child" and lists nine factors the court must consider.

[2] *Vachon v. Pugliese*, 931 P.2d 371, 375 (Alaska 1996) (citing *Gratrix v. Gratrix*, 652 P.2d 76, 79 (Alaska 1982)); *see also Craig v. McBride*, 639 P.2d 303, 304 (Alaska 1982) (collecting cases).

findings are clearly erroneous."[3] Abuse of discretion in a child custody case is established if the trial court considers improper factors or improperly weighs certain factors in reaching its decision.[4] Factual findings are clearly erroneous when a review of the entire record leaves this court with a "definite and firm conviction that a mistake has been made."[5] We give "particular deference" to a trial court's findings when they are based primarily on oral testimony.[6]

6. Marjorie first argues that at the interim hearing the superior court failed to perform a thorough review of the statutory best interests factors set forth in AS 25.24.150(c) and (d). While this argument may be correct as it pertains to the interim hearing, any error was cured by the court's best interests analysis at trial. We therefore decline to review the court's interim custody ruling.

7. We conclude, however, that the court appears to have improperly considered Marjorie's marital status, or lack thereof, as a factor in its final custody ruling. Therefore, in light of our decision in *Craig v. McBride*,[7] we remand this case for clarification and further findings of fact, if necessary.

8. In *McBride* we made clear that "[t]o avoid even the suggestion that a custody award stems from a life style conflict between a trial judge and a parent . . . trial courts must scrupulously avoid reference to [life style] factors absent evidence of

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[3] *R.M. v. S.G.,* 13 P.3d 747, 750 (Alaska 2000) (quoting *Gratrix,* 652 P.2d at 79-80) (internal quotation marks omitted).

[4] *Jaymot v. Skillings-Donat,* 216 P.3d 534, 538-39 (Alaska 2009) (citing *Millette v. Millette,* 177 P.3d 258, 261 (Alaska 2008)).

[5] *Id.* at 539 (quoting *Millette*, 177 P.3d at 261).

[6] *Id.* (quoting *Ebertz v. Ebertz*, 113 P.3d 643, 646 (Alaska 2005)).

[7] 639 P.2d 303 (Alaska 1982).

an adverse effect to the parent-child relationship."[8] We recognized that a trial court may properly consider the parties' relative stability, but the analysis must be limited to conduct that could adversely impact the child or the parties' parenting abilities.[9]

9. Here, the superior court expressed concern about Marjorie's financial stability and her ability to provide a stable environment for the children based on her plan to leave her job and relocate to another state without immediate plans to secure a new job. But the court consistently discussed these concerns in conjunction with Marjorie's marital status, commenting that Marjorie planned to be "financially dependent on a man who has not committed himself to her over the long haul," that "[t]here is no commitment by [Marjorie's] boyfriend to support these children or [Marjorie],"[10] and that this was "a potentially very unstable arrangement which causes the court concern." We cannot conclude these comments were made only in passing because the court explained Marjorie's relocation "was a major factor which [led] the court to give [Christopher] primary custody." While the superior court may consider the financial stability of each party and each party's ability to provide a stable environment for the children when making a custody decision, the court may not rely on impermissible factors such as marital status or co-habitation in the absence of evidence that these factors detrimentally affect the children or a parent's parenting ability.[11]

10. Because the extent to which the superior court relied on Marjorie's marital status in its best interests analysis is unclear from the court's final custody order,

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[8] *Id.* at 306.

[9] *Id.* at 305-06.

[10] We note that even if Marjorie were to marry her boyfriend, he would still have no legal obligation to support the children.

[11] *See McBride*, 639 P.2d at 305-06.

we vacate the order and remand this case to the superior court for clarification. The court may also take additional evidence and make additional findings, if the court determines this is necessary. We decline to review the court's interim custody decision and affirm all other decisions on appeal. We retain jurisdiction of this appeal pending completion of the court's clarification and further proceedings, if any, on remand.